STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 19, 2006
v	No. 261095 Oakland Circuit Court
KEITH FITZGERALD PERRY, Defendant-Appellant.	LC Nos. 2003-193756-FC; 2003-193757-FC; 2003-193758-FC

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529, in each of three separate cases that were consolidated for trial. He was convicted as charged in each case and sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 10 to 40 years for each conviction. He appeals as of right. We affirm.

I. Underlying Facts

The three armed robberies occurred at three different Southfield stores on October 25, 2003, November 2, 2003, and November 9, 2003, respectively. On the morning of October 25, 2003, Stacy Demrose was working as a cashier at a Rite Aid.[1] Demrose testified that a man wearing a three-quarter length black leather coat and a baseball hat, whom she identified as defendant, came to the register and handed her a pack of gum and a $20 bill. When Demrose opened her register, defendant brandished a gun and demanded everything in the register. Demrose complied, and defendant instructed her to remain quiet and fled. In December 2003, Demrose identified defendant from a six-photograph array. She also identified defendant at the preliminary examination and at trial.

On the morning of November 2, 2003, Pamela Smith was working at a CVS pharmacy. Smith testified that a man, whom she later identified as defendant, handed her a pack of gum, breath mints, and a $20 bill, and requested change for a dollar. Defendant then opened his leather coat, revealing a gun, and directed Smith to "[g]ive [him] all the money in the register"

[1] Defendant lived in Southfield with his parents, in close proximity to the stores that were robbed.

and remain quiet. After Smith complied, defendant ordered her to lie down on the floor, and then fled. In December 2003, Smith identified defendant from the six-photograph array. Smith also identified defendant at the preliminary examination and at trial. According to Smith, there was no doubt in her mind that defendant was the perpetrator.

Dena Howard testified that, on the morning of November 9, 2003, she was working as a cashier at Farmer Jack. At one point, a man wearing a baseball hat and a leather jacket, whom Howard identified as defendant, gave her a candy bar and a dollar.[2] When Howard opened the register, defendant stated, "I need change for that five I gave you." As Howard was disputing the amount, defendant opened his black leather jacket, brandished a weapon, and demanded "the money." When Howard tried to alert another cashier, defendant pointed the gun at her, and directed her to remain quiet. Howard complied, and defendant fled. In December 2003, Howard viewed the six-photograph array. Howard eliminated five of the six photographs as possible suspects, but did not eliminate defendant's photograph. Howard could not, however, positively identify defendant as the perpetrator from his photograph. Howard subsequently identified defendant at his preliminary examination. She explained that she saw the perpetrator's eyes during the robbery, and could positively identify defendant because of his eyes.

James Hatchett testified that he was shopping at Farmer Jack on November 9, 2003, and heard a customer ask a cashier for change for $5. Hatchett then saw the customer lean over and whisper something to the cashier. As Hatchett was leaving, he observed the customer walk away rapidly. Hatchett was shown the six-photograph array, and immediately identified defendant as the customer. Hatchett did not positively identify defendant at the preliminary examination. He indicated that defendant looked different, explaining that he was bald and had no facial hair. Hatchett positively identified defendant at trial. He testified that there was no doubt in his mind that defendant was the person he saw at Farmer Jack on November 9.

Southfield Police Detective Chris Helgert testified that, during his interview of defendant, defendant offered to "cop" to the armed robberies if he was not charged with felony-firearm. During the execution of a search warrant at defendant's residence, the police found two baseball hats, a black leather coat, and .38-caliber ammunition.

The defense argued mistaken identity. Defendant's mother and children provided alibis for defendant for the times of the robberies. Defendant denied any involvement in the robberies, and testified that he was either at home with his parents or with his children at the times of the robberies. Defendant denied that he offered to plead guilty to armed robbery.

II. Improper Opinion Testimony

Defendant first argues that he is entitled to a new trial because Detective Helgert twice gave inadmissible opinion evidence. We disagree.

[2] A photograph from a surveillance camera was admitted into evidence and depicted that the perpetrator was wearing a baseball hat.

Because defendant failed to object to the detective's testimony or the prosecutor's conduct, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

During his direct examination testimony, defendant maintained his innocence, and, as noted by the trial court, essentially testified that he was living a "pure" and "clean life." On cross-examination, the prosecutor asked defendant whether he admitted to the police that he had used heroin at the time of the robberies, and coordinated his heroin use around his "parole office meetings." Defendant denied making the statement. On rebuttal, the prosecutor recalled Detective Helgert, who testified that defendant admitted that he coordinated his heroin use around his parole visits. Defendant contends that the prosecutor then impermissibly asked Detective Helgert to comment on his credibility through the following line of questioning:

Q. All right. Now, were you present for the defendant's testimony?

A. For that portion, I was, yes.

Q. All right. Can you tell the jury if that's an accurate statement?

A. I believe it's, I believe it's a quote.

Q. All right. *If the defendant denied that, would that be accurate?*

A. *If the defendant denied it, it's a lie*. [(emphasis added).]

It is improper for the prosecutor to ask a witness to comment on the credibility of another witness because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). To the extent the prosecutor's question violated this rule, defendant did not object to the exchange, and defendant has not demonstrated that any error affected his substantial rights. *Carines*, *supra*. As noted in *Buckey*, a timely objection "'could have cured any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction.'" *Buckey*, *supra* at 18 (citation omitted); see also *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Even though defendant did not object, the trial court instructed the jury that it was to assess and determine the credibility of the witnesses, and that it should evaluate the police officers' testimony by the same standards as any other witnesses. These instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Considering that defendant and Detective Helgert gave conflicting testimony on this matter, the jury was aware that the witnesses disagreed on whether defendant made the statement. Consequently, reversal is not warranted on the basis of this unpreserved issue.

Defendant also argues that Detective Helgert gave improper opinion testimony during defense counsel's cross-examination:

Q. After he denied any involvement in the robberies on December 4th, shouldn't that have been the end of it, Detective?

A. Absolutely not.

Q. Why would you go back on the 5th and then interview him when he's denied any involvement?

A. He'd been positively identified by four persons as being the holdup man. One of those identifications, as I testified yesterday, was instantaneous, it was so affirmative. *Frankly, in my mind, based on my training, education, and experience, there was no doubt in my mind, based on those identifications, his particular history, the geography involved, that he was involved in those holdups.* So it needed to be pursued. (emphasis added).]

MRE 701, which governs the admissibility of the detective's opinion, provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

The detective's statements were made in the context of his observation that the police investigation of defendant was not complete, and were relevant to explaining why the police interviewed defendant a second time. Indeed, the detective merely answered the question posed by defense counsel. A defendant cannot complain of testimony that he invited or instigated in an effort to support his defense. In other words, defendant "opened the door" to the challenged evidence. See, generally, *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988), and *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Furthermore, the detective's opinion regarding the need to further investigate defendant was rationally based on his own interaction with and perception of the witnesses, and was not overly dependent on technical or specialized knowledge. "In general, police officers may provide lay opinions about matters that are not overly dependent on scientific, technical, or specialized knowledge." *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988), mod on other grounds 433 Mich 862 (1989).

Even if the statements did not fall under MRE 701, given the compelling eyewitness testimony in this case, it is highly improbable that the challenged testimony affected the outcome of the proceedings. *Carines, supra*. We therefore reject this claim of error.

III. Prosecutorial Misconduct

We reject defendant's claim that he is entitled to a new trial because the prosecutor improperly denigrated defense counsel, and impermissibly referred to his convictions during closing arguments. Because defendant failed to object to the prosecutor's conduct, we review these unpreserved claims for plain error affecting substantial rights. *Id*.

Defendant claims that in the following comments made during closing argument, the prosecutor improperly denigrated defense counsel by indicating that defense counsel "coached" defendant's alibi witnesses:

> Now, alibi witnesses. He calls his two kids, a 10-year-old and a 12-year-old. They're in a tough spot. *I'm not going to say that they've been coached. I'll leave that up to you to determine if you think they've been coached or not.* But remember that the young man that testified first really didn't know exactly about times, didn't know a lot of things. The young girl testified, on cross-examination my first question was, "Did he pick you up on Friday or did he pick you up on Saturday?" And she first said Friday and then there was some hemming and hawing and she said Saturday. She's not sure. *I'll leave it up to you to determine if she's been coached.* [(emphasis added).]

A prosecutor may not personally attack the credibility of defense counsel, or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996); *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The jury's focus must remain on the evidence, and not be shifted to the attorneys' personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Considered in context, the challenged remarks, which drew no objection, did not amount to an improper personal attack on defense counsel, or improperly shift the jury's focus from the evidence to defense counsel's personality. The remarks were plainly focused on challenging the credibility of the defense witnesses. The prosecutor's remarks conveyed his contention that, based on the evidence, any defense based on defendant's children's testimony was suspect, and not credible. In making the challenged comments, the prosecutor asked the jury to evaluate the evidence and to consider that defendant's two children were unclear about the exact times and dates that they were with defendant. A prosecutor is free to argue reasonable inferences arising from the evidence as they relate to his theory of the case, including that a witness is not worthy of belief. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Launsburry*, 217 Mich App 358, 361, 551 NW2d 460 (1996). Consequently, this claim does not warrant reversal.

Defendant also asserts that, during closing argument, the prosecutor impermissibly argued that he was guilty of the charged offenses because of his criminal history:

> Now let's talk a little bit about the defendant in this case and the defendant's case. And he had absolutely no obligation to put on any type of case, the Judge instructed you at the beginning of the trial. But once he puts on witnesses, once the defendant takes the stand, he's subject to the same credibility questions as any other witness. His alibi witnesses are subject to the same credibility issues as any other witnesses. You won't see a special instruction that you're supposed to give the defendant more weight just because he testified. *A person that's been convicted of two proper armed robberies now comes in and tells you that he didn't commit the crime, even though four people that don't know him from Adam pick him out and say he's the person that committed the armed robberies.* [(emphasis added).]

* * *

> So consider the credibility as to a person that's been convicted of two prior armed robberies. And the Judge will instruct you how you're suppose to consider that testimony.

Defendant contends that the prosecutor continued to make similar improper remarks during rebuttal argument:

> Who's got the motivation in this case to lie, these people, the police, or the person that's been convicted of two prior occasions of an armed robbery and is looking at three armed robbery charges in this case? Consider the credibility of the witnesses, folks, and you've heard all the evidence . . .

Defendant did not object to the prosecutor's remarks below, and has not demonstrated a plain error affecting his substantial rights. *Carines*, *supra*. Defendant had two armed robbery convictions in 1997. The convictions were admitted and discussed during trial without objection. The crime of armed robbery contains an element of theft and, therefore, is an indicator that defendant is of dishonest character and may not testify truthfully. *People v Cross*, 202 Mich App 138, 147; 508 NW2d 144 (1993). Here, the prosecutor did not use defendant's prior convictions for an improper purpose, but to attack his credibility. During closing argument, the prosecutor asked the jury to consider defendant's prior convictions to evaluate his credibility. During rebuttal, the prosecutor asserted that defendant's past armed robbery convictions gave him a reason to lie because of his status at the time of the instant offenses. Moreover, in its final instructions, the trial court instructed the jury that defendant's prior convictions could only be considered in deciding whether they believed that defendant was a truthful witness, that they could not be used for any other purpose, and that a "past conviction is not evidence that the defendant committed the alleged crime in this case." The instructions were sufficient to dispel any prejudice. *Long*, *supra*.

IV. Effective Assistance of Counsel

Next, defendant argues that defense counsel was ineffective by eliciting evidence of defendant's prior convictions, failing to move for a mistrial, and failing to object to the prosecutor's conduct. We disagree.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Before trial, the prosecutor sought to introduce one of defendant's prior armed robbery convictions pursuant to MRE 404(b), through the testimony of the victim of the prior armed robbery. Defense counsel did not object because defendant was likely going to testify and counsel wanted the information admitted in the prosecutor's case-in-chief as opposed to during the impeachment of defendant. But because the witness did not testify, the conviction did not come in under MRE 404(b), and the prosecutor did not introduce defendant's conviction during its case-in-chief. However, both the prosecutor and defense counsel discussed defendant's prior convictions during opening statement. Thereafter, during the direct examination of defendant and his mother, defense counsel elicited that defendant had prior armed robbery convictions.

Defendant now claims that defense counsel was ineffective for eliciting his prior armed robbery convictions, and for failing to object when the prosecutor mentioned his prior criminal record in opening statement. Defendant has not overcome the presumption that defense counsel's decision to elicit the evidence of his prior convictions was trial strategy, nor has he shown that the evidence affected the outcome of the proceedings. The defense theory throughout trial was that the police focused on defendant because he was on parole for the prior armed robbery convictions and lived close to where the robberies occurred. Defense counsel used defendant's prior convictions to support his claim that defendant did not commit the robberies at issue here. Defense counsel argued that defendant pleaded guilty to the 1997 crimes because he was guilty, but went to trial in this case because he was not guilty. The defense also asserted that defendant had since changed his life. During opening statement, defense counsel stated:

> The evidence will show that, in 1997, there were two armed robberies that he was involved in. The evidence will show that he pled guilty to those armed robberies. And we will show this is the first time that he had committed a crime. He had a clean record as a juvenile and, after that point in his life, he had a clean record. Now, he made this mistake in 1997. You'll hear testimony about it. He did not get probation. He went to prison. And he had a long time to think about what he had done.

Additionally, both defendant and his mother testified that defendant had promised that he would never return to prison because his children were "his life."

Under the circumstances, defense counsel's strategy was not unreasonable. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart* (*On Remand*), 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id*. Furthermore, given the overwhelming weight of the evidence produced at trial, no reasonable likelihood exists that defendant would not have been convicted but for trial counsel's action. *Pickens*, *supra* at 302-303. Therefore, defendant cannot establish a claim of ineffective assistance of counsel.

We also find no merit to defendant's claim that defense counsel was ineffective for failing to move for a mistrial when the prosecutor failed to produce the victim from defendant's 1997 armed robbery. The witness was going to testify about the 1997 armed robbery to demonstrate the similarity to the instant armed robberies. If defense counsel had moved for a mistrial, the prosecutor may have taken steps to secure the witness, which would have likely been more prejudicial to defendant than the reference made in opening statements. Thus, defendant has not overcome the presumption of sound trial strategy. *Stewart*, *supra*.

We also reject defendant's claim that defense counsel was ineffective for failing to object to the unpreserved claims of errors discussed in parts II – III. In light of our conclusion that these matters did not affect defendant's substantial rights, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Pickens, supra* at 302-303.

V. Rebuttal

Lastly, defendant claims that the trial court abused its discretion by allowing the prosecutor to introduce prior uncharged crimes for impeachment. We disagree.

As previously indicated, defense counsel discussed defendant's prior convictions during opening statement. During defense counsel's direct examination of defendant, the following exchange occurred:

Q. Now, have you ever committed a robbery before?

A. Past criminal history, in '97 I committed two robberies that I was convicted of and did time for.

Q. Now, did you have a trial regarding those robberies?

A. No, I didn't. I felt I didn't want to waste the time of the court or anyone else. I did it, so I did my time for it.

Q. And you, you had a lawyer then; correct?

A. Yes, I did, sir.

Q. And you didn't get probation?

A. No, I didn't sir.

The prosecutor sought to cross-examine defendant about the fact that he was originally charged with five counts of armed robbery in 1997, and pleaded guilty to two as part of a plea agreement. In allowing the rebuttal evidence, the trial court indicated, inter alia, that defense counsel "opened the door, [he] asked the question," and that defendant "cannot lie on the stand and think he's going to get away with it." In response to the prosecutor's inquiry, defendant admitted that three charges of armed robbery were dismissed as part of a plea bargain. On redirect, defendant maintained that, in 1997, his attorney negotiated with the prosecution at his request and he pleaded guilty to two armed robberies because he was guilty of those two offenses. Defendant testified that he did not request a plea in this case because he is not guilty.

Decisions concerning the admissibility of rebuttal evidence are within the discretion of the trial court and "will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). The purpose in limiting the scope of rebuttal is based on the trial court's discretionary authority to prevent the trial from litigating secondary issues. *Id.* Therefore, it is a necessity that the trial court evaluate the overall impression that might be created by the defense proofs. *Id.* "Rebuttal evidence is admissible to 'contradict,

repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *Id.* at 399 (citations omitted). "[T]he test of whether rebuttal evidence was properly admitted is . . . whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Id.*

On this record, we cannot conclude that the trial court abused its discretion. The evidence responded to the impressions raised by defendant during direct examination. We agree that the overall impression of defendant's testimony was that he was charged with only two armed robberies in 1997, and pleaded guilty to those two crimes because it was the right thing to do to prevent an undue waste of time. The evidence that defendant was actually charged with five armed robberies and that three charges were dismissed as part of a plea agreement directly contradicted or explained the evidence produced by defendant and tended directly to weaken the same. *Id.* We note that the prosecutor did not mention the three dismissed charges in closing argument, or otherwise improperly discuss them. Reversal is not warranted on this basis.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto